IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3606 OF 2006

Rameshchandra Biyani .... Petitioner.

V/s

Stock Holding Corporation
India Ltd. & Anr. .... Respondents.

Shri N.K. Thakore i/b Prakash Naik for the Petitioner.

Shri P.D. Desai for Respondent No.1.

Smt. M.M. Deshmukh for the Respondent No.2 - State.

CORAM: V.M. KANADE, J.
DATE 30th November, 2007.

P.C.:

1. Petitioner is challenging the order passed by the Metropolitan Magistrate issuing process on a complaint being filed by Respondent No.1 under section 138 of the Negotiable Instruments Act.

2. Brief facts which are relevant for the purpose of deciding this Petition are as under:-

3. Respondent No.1 filed a complaint in the Court of Metropolitan Magistrate 33rd Court, Ballard Pier in which it was alleged that the accused No.1 was carrying on the business in the name and style of

M/s Harishchandra Biyani and was the sole proprietor of the said proprietory firm and that the accused No.2, the Petitioner herein, was his brother and was also the Constituted Attorney of accused No.1. Certain monies were advanced to accused No.1 and when the said amount became due and payable, the accused No.1 signed memorandum of understanding and agreed to issue cheques of an aggregate amount of Rs 8,04,00,000/-. The first cheque was dated 23/03/2001 for an amount of Rs 7.04 crores and the second cheque was dated 19/03/2001 which was for an amount of Rs 1 crore. The said cheques were signed by the accused No.2, the Petitioner herein, in his capacity as a Constituted Attorney of accused No.1. After he gave assurance that accused No.1 would be having sufficient funds in his account and that the said cheques would be honnoured when deposited for encashment, the complainant deposited the said cheque for an amount of Rs 7.04 crores on 30/03/2001. The said cheque was dishonoured by the Bankers of the accused. Accordingly, a notice was sent to both the accused and when the accused failed to make payment, the complaint was filed.

4. The accused No.2 - Petitioner herein, initially filed an application before the Magistrate for dropping the proceedings. This application was rejected by the learned Magistrate in view of the judgment of the Apex Court in Adalat Prasad case. Against this order, the Petitioner filed revision application in the Sessions Court. Sessions Court, however, did not entertain the revision application solely on the ground that since the plea of the accused was recorded on 07/01/2000, the said application could not be entertained in view

of the judgment of the Apex court in the case of Subramanium Sethuraman Vs. State of Maharashtra & Anr reported in 2004 ALL MR (Cri) 3469 (S.C.)

5. Being aggrieved by the aforesaid orders, Petitioner has filed the present Petition. It is urged on behalf of the Petitioner that the Petitioner, being the Constituted Attorney of accused No.1, could not be prosecuted under the provisions of section 138. It is submitted that the cheque was issued by the proprietory firm, of which the accused No.1 was the proprietor and the Petitioner - accused No.2 was only the Constituted Attorney. It is submitted that, hence, the Petitioner was not a drawer of the cheque and, as such, the process could not have been issued by the Metropolitan Magistrate. In support of the said submission, the learned Counsel relied on the judgment of the Apex Court in Raghu Lakshminarayan Vs. Fine Tubes, reported in **2007 ALL MR (Cri) 1738 (S.C.).** He submitted that the revisional court erred in not exercising its revisional jurisdiction merely because the plea was recorded.

6. In my view, submissions made by the learned Counsel appearing on behalf of the Petitioner cannot be accepted. At this stage, it would not be possible to decide on which account the cheque had been issued and who is the person maintaining that account. These facts can be decided only after the evidence is led by the parties. At the stage of issuance of process, Magistrate has to consider the averments made in the complaint and if the facts which are disclosed in the complaint, even if they are taken on its face value, disclose the

commission of offence, the Magistrate can issue process on such complaint. In my view, therefore, there is no infirmity in the order of issuance of process which is passed by the Magistrate. The ratio of the judgments on which reliance is placed by the learned Counsel appearing on behalf of the Petitioner in the case of Raghu Lakshminarayan (supra) is not applicable to the facts of the present case. In the said case, process was set aside primarily on the ground that the averments which were made in the complaint did not contain the requisite averments to bring the case within the purview of section 141 of the Act. The facts of the present case are entirely different and, therefore, the ratio of the said judgment would not apply to the facts of the present case. Thus, no case is made out for interfering with the order passed by the learned Magistrate.

7. Criminal Application is dismissed. All questions raised in this application are kept open. Trial Court is directed to decide the case as expeditiously as possible and, in any case, within a period of six months. Application is accordingly disposed of.

(V.M. KANADE, J.)